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THE CONSIDERATION OF A CONTRACT.

NO. II.

§ 27.—*Forbearance of a Right of Action*.—An agreement to forbear to institute or prosecute legal proceedings for any legal right or demand, is a valid consideration for a promise to pay a debt or a sum of money additional to that due, or to do any other lawful act.¹ The debtor receives a benefit from the delay, as the time for meeting his liabilities is extended. The creditor stays the processes of the law for the collection of his dues. He may thereby receive an injury from the subsequent irresponsibility of the debtor, or from the loss of the benefit which the present use of the right or investment of the property he claims would contribute. It is immaterial whether the time of forbearance is long or short, provided it be certain; or whether any actual injury results to the one party from the forbearance or actual benefit to the other. The forbearance need not be adequate to the consideration promised. It will sustain a pro-

¹ Com. Dig. Ass. B., *Bidwell vs. Catton*, Hob. 216. *Forth vs. Stanton*, 1 Saund. (Williams) 210, note; Selwyn N. P. Ass. 44. *Colgin vs. Henley*, 6 Leigh. 85. *Ford vs. Rehman Wright*, 434; 17 Vt. 58. *Call vs. Calef*, 4 Cush. 388.

mise to pay a much larger sum than the original claim, inasmuch as a smaller sum may be worth more now than a much larger at a future time.¹ It is immaterial whether the forbearance is the consideration of a promise of the party liable to suit, or of a third person, as in either case an equal injury results to the party who forbears.² Nor is it necessary that the forbearance be extended at the instance of the party liable to suit, where it is the consideration of the promise of a third person.³ Forbearance is generally the consideration of the guaranty of an existing debt, as when the payee of a note agrees to forbear to sue the maker for one year in consideration of the guaranty of a third person to ensure its payment.⁴ It will sustain the promise of a person bound only in a representative capacity, so as to render him personally liable *de bonis propriis*,⁵ also the promise of a debtor to pay the assignee of a debt so as to enable the latter to sue in his own name.⁶

§ 28.—The forbearance necessary to uphold a promise, need not amount to an entire discharge. It may be for a definite and limited time⁷—for a reasonable and convenient time⁸—or it may be general in its terms.⁹ If it is for a reasonable time, such forbearance must be averred in an action on the promise, and the Court will decide whether it is or not.¹⁰ If it is general in its terms, it

¹ *Smith vs. Algar*, 1 B. & Ad. 603.

² Roll. Abr. 27, Pl. 45. *Carne vs. Richards*, Cro. Car. 273. *Therne vs. Fuller*, Cro. Jac. 396. *King vs. Upton*, 4 Greenl. 384. *Watson vs. Randall*, 20 Wend. 201. *Silvis vs. Ely*, 3 W. & S. 420. *Jennison vs. Stafford*, 1 Cush. 168.

³ *Rood vs. Jones*, 1 Dong. (Mich.) 188.

⁴ *Sage vs. Wilcox*, 6 Conn. 81.

⁵ *Barber vs. Fox*, 1 Saund. (Williams) 137, note c. Id. 210, note b. *Emmet vs. Kearnes*, 7 Dowl. 630. *Rood vs. Jones*, 1 Dong. (Mich.) 188.

⁶ 1 Roll. Abr. 20 pl. 11, 12. *Morton vs. Bum*, 7 A. & E. 19.

⁷ *Maturè vs. West*, Cro. Eliz. 665.

⁸ *Lugen vs. Broughton*, 3 Balst. 206. *Sidwell vs. Evans*, 1 Penn. 383.

⁹ *May vs. Alvares*, Cro. Eliz. 387. *Downing vs. Frink*, 4 Johns. 239. *Giles vs. Ackles*, 9 Barr. 147; *Contra. Phillips vs. Sackford*, Cro. Eliz. 445. See *Rix vs. Adams*, 9 Vt. 233.

¹⁰ *Powell on Cont.* 354; 1 Sid. 45; 7 B. & C. 423. *Elting vs. Vanderlyn*, 4 Johns. 237.

will be presumed to be absolute and perpetual;¹ and the promise resting on such forbearance is discharged whenever the suit to be forborne is commenced.² But forbearance *for some time, a short time, a little time, (pro aliquo tempore, per breve aut paululum tempus,)* is too shadowy for judicial determination, and too indefinite to be of benefit to the debtor, or detriment to the creditor, and will not support a promise, even though the creditor forbears a long time.³ If, however, it is to continue "*for some little time, (pro aliquo tempore,)* to wit: *for a fortnight or thereabouts,*" it is sufficient, the *videlicet* furnishing a measure of reasonable certainty.⁴ So, also, where the agreement is "*to give further time for payment,*"⁵—to forbear "*until the defendant should be able,*"⁶ or "*till a person comes to London,*"⁷ or "*sends to Liverpool,*"⁸ it is sufficient, a reasonable time being intended for the fulfilment of those conditions.⁹

§ 29.—The stipulated forbearance may be to desist from a suit at law or in equity,¹⁰ or from a further claim before a justice of the peace¹¹—from a proceeding on a *capius utlagatum*¹²—to delay or discontinue a trial before issue joined,¹³ or execution after judgment rendered¹⁴—to discharge a debtor from custody or execution,¹⁵ or

¹ Com. Dig. Ass. B. *Therne vs. Fuller*, Cro. Jac. 396. *Mapes vs. Sidney*, Id. 684. *Hamaker vs. Eberly*, 2 Binn. 506. *Sidwell vs. Evans*, 1 Penn. 383. *Lonsdale vs. Brown*, 4 Wash. C. C. 151.

² *Clark vs. Russell*, 3 Watts. 213.

³ *Lutwich vs. Hussey*, Cro. Eliz. 19. *Tricket vs. Mandlee*, 1 Sid. 45. *Sidwell vs. Evans*, 1 Penn. 385. *Lonsdale vs. Brown*, 4 Wash. C. C. 151. "*Breve tempus* is uncertain, and *non constat*, what time it is," Cro. Jac. 250.

⁴ *Baker vs. Jacob*, 1 Balst. 41. *Lonsdale vs. Brown*, *supra*.

⁵ *King vs. Upton*, 4 Greenl. 387.

⁶ *Lonsdale vs. Brown*, *supra*.

⁷ *Quick vs. Copleston*, 1 Sid. 242.

⁸ *Tricket vs. Mandlee*, 1 Sid. 45.

⁹ So, where the declaration averred an argument to forbear, as the consideration, without stating the time, it was held after verdict sufficient, for a reasonable time shall be intended, and that is an ample consideration, *Mapes vs. Sidney*, Cro. Jac. 683.

¹⁰ *Dowdenay vs. Oland*, Cro. Eliz. 768. *Coulston vs. Calt*, Cro. Eliz. 847.

¹¹ *Rippon vs. Norton*, Cro. Eliz. 881.

¹² *Jennings vs. Harley*, Cro. Eliz. 909; S. C. Yelv. 19.

¹³ *Hamaker vs. Eberly*, 2 Binn. 509. *McKelvy vs. Wilson*, 9 Barr. 183.

¹⁴ *Lent vs. Padelford*, 10 Mass. 230. *Train vs. Gold*, 5 Pick. 380. *Selvis vs. Ely*, 3 W. & S. 420. *Brice vs. Clark*, 8 Barr. 301. *Giles vs. Ackles*, 9 Id. 147.

¹⁵ *Atkinson vs. Bayntum*, 1 Bing. N. C. 444. *Giles vs. Ackles*, *supra*.

to delay or discontinue any other judicial proceedings. The forbearance of a cause of action, *yet to accrue*, as well as of one already existing is sufficient. Therefore the promise of a surety to forbear suit against his principal after payment of the debt by himself, is a valid consideration for a promise of indemnity.¹

§ 30.—There must be a cause of action present or prospective, not a mere unfounded claim, in order to constitute the forbearance a valid consideration.² If there is none, no injury will result to the one party, or benefit to the other, from the delay. Forbearance to sue a widow on a note given during coverture,³ or an adult on a bond given by him as surety, in infancy,⁴ or a joint obligor on a bond after his co-obligor has been released,⁵ or an heir on the bond of his ancestor, in which he is not expressly bound,⁶ or on a note given by the maker during his intoxication,⁷ or to procure a discharge from an illegal arrest,⁸ is no consideration; nor will forbearance to sue, where there are no parties liable to suit,⁹ or to levy execution on property in which the debtor has no interest,¹⁰ or no interest liable to be levied on, constitute a consideration. The forbearance of judicial proceedings, instituted without cause, is, as we have seen, and as has recently been decided by the highest judicial authority, no consideration for a promise, at least if they were known to be causeless by the party instituting them, and to whom the promise was made.¹¹ The same rule, notwithstanding some early conflicting dicta, applies whether they are yet to be commenced,

¹ *Hamaker vs. Eberly*, 2 Binn. 506.

² *Tooley vs. Windham*, Cro. Eliz. 206. *Hamaker vs. Eberly*, *supra*. *Powell on Cont.* 354.

³ *Lloyd vs. Lee*, 1 Str. 94.

⁴ *Latch*, 142.

⁵ *Hammon vs. Roll*, March, 202. 8 Dowl. 604.

⁶ 1 Lev. 165. *Barber vs. Fox*, 2 Saund. 136.

⁷ *Newell vs. Fisher*, 11 S. & M. 431.

⁸ *Atkinson vs. Settree*, Willes, 482. *Commonwealth vs. Johnson*, 3 Cush. 454.

⁹ *Style*, 248. *Jones vs. Ashburnham*, 4 East. 455. *Nelson vs. Searle*, 4 M. & W. 795.

¹⁰ *Rood vs. Jones*, 1 Dong. (Mich.) 188.

¹¹ *Wade vs. Simeon*, 2 C. B. 548. *Per Tindal, C. J. Smith vs. Monteith*, 13 M. & W. 427.

or are already depending.¹ But it is sufficient if the event of the suit admits of honest doubt, and the burden of proof is on the party who has promised in consideration of the promise to forbear, to show that no action could have been maintained.²

§ 31.—Forbearance is a valid consideration, notwithstanding a parol agreement or a covenant not to sue for a limited time, will not bar an immediate action, since damages may be recovered for its breach.³ It cannot be barred by anything less than a perpetual covenant amounting to a release. But in order to constitute the forbearance a consideration, the promise founded on it and the promise to forbear, must be mutually binding, so as to create a right of action on the breach of either.⁴

§ 32.—*Compromise of a right of action.*—Compromises of doubtful and conflicting rights, and all agreements entered into in good faith for the purpose of settling accounts, adjusting boundaries, or otherwise preventing litigation, which are not contrary to law or public policy, are sustained by the courts.⁵ Such compromises are favored by the law, which seeks to disburden the courts, and facilitate the settlement of disputes by the parties themselves. They are illustrated by mutual submissions to arbitration,⁶ which must be mutually binding,⁷ and by waivers of legal and equitable rights and

¹ See cases cited in the preceding note.

² *Bidwell vs. Catton*, Hob. 216. *Longridge vs. Dorville*, 5 B. & Al. 117. *Blake vs. Peck*, 11 Vt. 483. *Truett vs. Chaplin*, 4 Hawks. 181. *Gould vs. Armstrong*, 2 Hall, 266.

³ *Thimbleby vs. Barron*, 3 M. & W. 210. *Cuyler vs. Cuyler*, 2 Johns. 186. *Chandler vs. Herrick*, 19 Id. 129. *Reed vs. Shaw*, 1 Blackf. 245, note (1). *Berry vs. Bates*, 2 Id. 118. *Mendenhall vs. Lenwell*, 5 Id. 125. *Lowe vs. Blair*, 6 Id. 282. *Clark vs. Snelling*, 1 Smith (Ind.) 201. This rule is of ancient origin. See *Ayloff vs. Sirman*, Carth. 63. S. C. 1 Show, 46. Comb. 122; 2 Salk. 573.

⁴ *Chitty on Cont.* 44. *Cobb vs. Page*, 17 Penn. State, 469.

⁵ *Penn vs. Lord Baltimore*, 1 Ves. Sen. 450. *Cann vs. Cann*, 1 P. W. 727. *Atlee vs. Backhouse*, 3 M. & W., 648. *Covode vs. McKelvy*, Addison 56. *Lane vs. Lane*, 6 Munf. 405. *Truett vs. Chaplin*, 4 Hawks, 178. *Brown vs. Sloan*, 6 Watts 421. *Rice vs. Bixler*, 1 W. & S. 454. *Okeson vs. Barclay*, 2 Penn. 531. *McKinley vs. Watkins*, 13 Ill. 140.

⁶ Com. Dig. Ass. B. 2, 9. *Jones vs. Boston Mill Corp.* 4 Pick 507. *Hodges vs. Saunders*, 17 Id. 470.

⁷ *Chitty on Cont.* 44.

defences,¹ the validity of which, as considerations is independent of subsequent judicial decisions.² The doubt or conflict may consist in matter of law, or fact, or in any of the uncertain issues of a trial. A mere unfounded claim will not support a compromise,³ but an honest doubt as to its validity is sufficient.⁴ The abandonment of a suit in which the public have an interest, is against public policy, and therefore no consideration, such for instance as the prosecution of a petition against the right of a person to hold a public office which he has attained by bribery.⁵

§ 33.—Compromises are not affected by the subsequent adjudication of any legal question, the discovery of any new fact, or any other event which settles the right in either of the parties, and would, if previously known, have prevented him from entering into them. They are designed to conclude disputes in which the right may be entirely on one side, and must rest, if at all, on the circumstances and means of knowledge existing at the time they were made, or else they would be so contingent as not to be resorted to.⁵ The arrangement, as we have seen, must be entered into in good faith. If the parties have not equal knowledge, or equal means of knowledge of the circumstances which determine their rights, and

¹ *Stebbins vs. Smith*, 4 Pick. 97. *Smith vs. Weed*, 20 Wend. 477. *Williams vs. Alexander*, 4 Iredell Eq. 207. *Nicholson vs. May, Wright*, 660, 9 Cow. 266.

² 5 Peters 114. The waiver of a tort is sufficient. *Davis vs. Morgan*, 4 B. & C. 8. *Brealey vs. Andrew*, 7 A. & E. 108.

³ *Edwards vs. Baugh*, 11 M. & W. 641. The later English authorities seem to limit the binding force of agreements to compromise, not yet executed, to cases where there are cross demands. *Bridgman vs. Dean*, 8 Eng. Law & Equity, 534.

⁴ *Longridge vs. Dorville*, 5 B. & Al. 117.

⁵ *Coppock vs. Bower*, 4 M. & W. 360. *Kier vs. Leeman*, 9 Q. B. 371. *Gardner vs. Maxey*, 9 B. Monr. 90. *Clark vs. Ricker*, 14 N. H. 44. But a civil action for an injury punishable criminally, may be compromised. *Walbridge vs. Arnold*, 21 Conn. 424.

⁶ *Stapilton vs. Stapilton*, 1 Atk. 10; *Leonard vs. Leonard*, 2 Ball & B. 79; *Pickering vs. Pickering*, 2 Beav. 31; *Stewart vs. Stewart*, 2 Clark & Finelly, 966; *Taylor vs. Patrick*, 1 Bibb, 168; *Fisher vs. May*, 2 Id. 448; *Moore vs. Fitzwater*, 2 Rand. 442; *Bennett vs. Paine*, 5 Watts, 259; *Lyon vs. Richmond*, 2 Johns Ch. 51. *Holcomb vs. Stimpson*, 8 Vt. 141; *Bailey vs. Wilson*, 1 Dev. & Bat. Ch. 182; *Russell vs. Cook*, 3 Hill, 504; *Barlow vs. The Ocean Insurance Company*, 4 Met. 270; *Allis vs. Billings*, 2 Cush. 25.

either has practised undue advantage on the other, it will be set aside in equity.¹ But it will not be impeached for mere mistake of the law by either, where no deception was practised on him.² It will be scrutinized by the courts whenever any fiduciary relation has existed between them, as that of executor and devisee, insured and insurer, requiring the one to disclose freely all the facts to the other.³

§ 34.—Here it may be remarked generally that the considerations already mentioned, cease to be such, when the benefit is conferred gratuitously and will not support even a subsequent promise—that such benefit cannot be considered gratuitous where it is accompanied with a request and promise on the part of the recipient, and that the request and promise may be implied from circumstances.⁴ They are very often implied when the consideration consists of work performed or goods sold, and are more easily implied in some cases than in others—as where a father's promise to pay for clothing furnished by a tailor to his minor son, which was worn by the son with the knowledge of the father, and without his dissent, was implied.⁵ These points will be discussed under the head of executed considerations.⁶ And here closes the classification of valid considerations.

§ 35.—*Invalid considerations classified.*—These terms, as we have said, are not strictly correct, but are dictated by convenience. In discussing such as are invalid, valid considerations will necessarily be mentioned. Invalid considerations consist in general of gratuitous promises in which one party engages to do some act beneficial to another, without the latter's promise to do anything in return. The law refuses to execute them as they involve no benefit to the promissor, or injury to the promisee.

¹ Leonard *vs.* Leonard, 2 Ball & B. 171, 181; Truett *vs.* Chaplin, 4 Hawks, 178; Hoge *vs.* Hoge, 1 Watts, 216, 4 Met. 270, 4 Ves. 850, 1 Story Eq. Juris. § 131.

² Shotwell *vs.* Murray, 1 Johns. Ch. 512; Lyon *vs.* Richmond, 2 Id. 51; Taylor *vs.* Patrick, 1 Bibb, 168; Fisher *vs.* May, 2 Id. 44; Stewart *vs.* Stewart, 6 Clark & Fi. 968.

³ Pickering *vs.* Pickering, 2 Beav. 31.

⁴ See § 46 and cases cited. *Nemo præsuntur donare.* Moreton *vs.* Noble, 1 La. Ann, 192.

⁵ Law *vs.* Wilkins, 6 A. & E. 718.

⁶ See §§ 45, 46.

§ 36.—General illustrations. A motive, as an executor's regard for the wishes of his testator¹—or an expectation as of marriage,² is not a valid consideration. Love, affection, gratitude, relationship, which are technically called *good*³ in contradistinction to valuable considerations, will not give validity to a promise when made by a parent to his child, or by a child to his parent.⁴ Gifts are upheld by the law provided the rights of third parties are not prejudiced—but delivery is necessary to complete them.⁵ The same principle applies to a *donatio causa mortis* as to a *donatio inter vivos*.⁶ Equity will not enforce a mere voluntary contract or moral obligation—even between parties standing in intimate relations to each other.⁷ The later authorities sustain the doctrine that the meritorious consideration of affection for wife and children will not justify its interposition.⁸ But if such a contract has been executed, so that nothing further remains to be done by the parties, equity will not allow it to be revoked.⁹ The promise of a father to pay the existing debt of his son, and the promise of the son to pay that of the father are not binding, unless some new consideration intervenes at

¹ Thomas *vs.* Thomas, 2 Q. B. 851; S. C. 2 G. & D. 226.

² Raymond *vs.* Sellick, 10 Conn. 480.

³ 2 Bla. Comm. 444; Gully *vs.* The Bishop of Exeter, 10 B. & C. 584; Van Derveer *vs.* Wright, 6 Barb. 547; Duvoll *vs.* Wilson, 9 Id. 487.

⁴ Pennington *vs.* Gittings, 2 G. & J. 208; Holliday *vs.* Atkinson, 5 B & C. 501; Grover *vs.* Grover, 24 Pick. 261; Hill *vs.* Buckminister, 5 Id. 391; Story, Notes, § 184.

⁵ Noble *vs.* Smith, 2 Johns. 52; Pearson *vs.* Pearson, 7 Id. 26; Fowler *vs.* Stewart, 1 McCord, 504; Ewing *vs.* Ewing, 2 Leigh, 387. It was held in Smith *vs.* Smith, 7 C. & P. 401, that a father's gift of a watch to his minor child cannot be revoked.

⁶ Parish *vs.* Stone, 14 Pick. 198; Carpenter *vs.* Dodge, 20 Vt. 595.

⁷ Colman *vs.* Sarrell, 1 Ves. Jr. 50; Ellison *vs.* Ellison, 6 Id. 656; Tufnell *vs.* Constable, 8 Sim. 69; Black *vs.* McCord, 2 H. & G. 100; 1 Fonb. Eq. Bk. 1, Ch. v. § 2; 2 Story Eq. Juris. § 793, (a).

⁸ Holloway *vs.* Headington, 8 Sim. 325; Jeffreys *vs.* Jeffreys, 1 Craig & Phillips, 138; Van Derveer *vs.* Wright, 6 Barb. 547; Duvoll *vs.* Wilson, 9 Id. 487; 2 Story Eq. Juris. § 793, (b).

⁹ Fortescue *vs.* Barnet, 3 M. & K. 36; Minturn *vs.* Seymour, 4 Johns. Ch. 498; 2 Story Eq. Juris. § 706, (a).

the request of the promisor.¹ The promise of a party to pay a debt absolutely, for which he is liable only in a particular right or representative capacity, is not binding without some additional benefit to extend his liability.² So also the promise of the purchaser of real or personal estate to the seller after the property has passed, not to employ it for a particular purpose,³ or to pay an additional sum beyond the purchase money,⁴ is of no effect. A mere offer, as we have seen, is without consideration, and may be withdrawn.⁵ The transfer of a bargain which is closed, may be a valid consideration—but that of a mere offer which is not binding, or of an agreement which is void for any reason, is not.⁶ An agreement to convey land to a party in consideration of his promise to settle upon it, will not be enforced in equity.⁷

¹ *Mills vs. Wyman*, 3 Pick. 307; *Cook vs. Bradley*, 7 Conn. 57; *Parker vs. Carter*, 4 Munf. 273. So the promise of a father to pay the expense incurred in the support of his minor children taken from him without his consent, he having furnished reasonable support for them at home is of no effect. *Dodge vs. Adams*, 19 Pick. 429; *Chilcott vs. Trimble*, 13 Barb. 502.

² *Wennall vs. Adney*, 3 B. & P. 249, note; *Rann vs. Hughes*, 7 T.R. 350; *Ten Eyck vs. Vanderpool*, 8 Johns. 120; *Try vs. Topping*, 9 Wend. 273, 5 Binn. 33. The surrender of the creditor's security was held a sufficient consideration for an executor's promise to pay the defendant's debt—there being sufficient assets. *Stebbins vs. Smith*, 4 Pick. 97.

³ *Geer vs. Archer*, 2 Barb. 420.

⁴ *Hawley vs. Farrar*, 1 Vt. 420. So where a promise was made to make up the deficiency in land sold, which proved less in area than was "supposed" in the descriptive clause; *Smith vs. Ware*, 13 John 257; *Williams vs. Hathaway*, 19 Pick. 337; or to make up for the unsoundness of a slave after sale—there being no fraud or warranty; *Hatchell vs. Odom*, 2 D. & Ba. 302, or for the purpose of quieting the seller's complaints as to the inadequacy of the price. *Tryon vs. Mooney*, 9 Johns. 358; *Geer vs. Archer*, 2 Barb. 420.

⁵ See § 24.

⁶ *Carleton vs. Jackson*, 21 Vt. 481; *Ehle vs. Judson*, 24 Wend. 97; *North vs. Forest*, 15 Conn. 400; *Silvernail vs. Cole*, 12 Barb. 685. But see *McKier vs. Harwood*, (S. C. of Ala. Jan. 1849,) 12 Law Rep. 157. A void note is no consideration for a new one. *Commonwealth vs. Whitney*, 1 Met. 21.

⁷ *Reed vs. Vannorsdale*, 2 Leigh. 569; *Forward vs. Armstead*, 12 Ala. 124, 13 Ves. Jr. 158.

§ 37.—*Part payment of a Debt in satisfaction of the whole.*—The promise of a creditor to accept part payment of a debt in satisfaction of the whole or to accept the payment of one debt in satisfaction of two distinct claims, or to forbear suit for the residue of a debt on payment of a part; or not to look to one maker of a joint and several note for the residue on the other maker's payment of part, will not be recognized as binding.¹ The creditor being entitled to the entire amount of his claim at the appointed time receives no benefit from the partial payment which the law will recognize, and his promise to remit a part differs not from a promise to bestow a gratuity. The debtor does no more than his duty when he pays a part of the debt.² But the creditor's promise to accept part payment in satisfaction of the whole claim, if he is to receive in consideration therefor any collateral benefit, as payment of a less sum before the note or other claim becomes due,³ or at another place more beneficial than the one appointed,⁴ or to be secured by the responsibility of a third person as indorser or surety,⁵ is valid. But additional security is not a consideration, unless the debtor is bound to furnish it.⁶ In these cases the claim may be more valua-

¹ *Cumber vs. Wane*, 1 Str. 426; *Heathcote vs. Crookshanks*, 2 T. R. 24; *Pabodie vs. King*, 12 Johns. 426; *Hall vs. Constant*, 2 Hall, 185, 1 Dev. Ch. 429, 3 Harring. 366 3 Miss. 453; *Cutter vs. Reynolds*, 8 B. Munr. 576; *Barrow vs. Vandevent*, 13 Ala. 232; *Bailey vs. Day*, 26 Maine, 88; *Jenners vs. Lane*, Id. 475; *Pomeroy vs. Slade*, 16 Vt. 220; *Daniels vs. Hatch*, 1 Zabriskie, 391; *Greenwood vs. Ledbetter*, 12 Price, 183; *Smith vs. Bartholomew*, 1 Met. 276; *Warren vs. Skinner*, 20 Conn. 559. Nor will the actual acceptance of part bar an action for the residue. *Fitch vs. Sutton*, 5 East, 230.

² *Heathcote vs. Crookshanks*, 2 T. R. 27; *Fitch vs. Sutton*, 5 East, 230, per Lord Ellenborough.

³ *Bailey vs. Day*, 26 Maine, 88; *Brooks vs. White*, 2 Met. 283.

⁴ *Co. Litt.* 212 (b); *Harper vs. Graham*, 20 Ohio, 105.

⁵ *Boyd vs. Hitchcock*, 20 Johns. 78; *Kellogg vs. Richards*, 14 Wend. 116; *Phillips vs. Berger*, 2 Barb. 608; *Browne vs. Stackpole*, 9 N. H. 478; *Gunn vs. McArder*, 2 Iredell Ch. 72; or the personal responsibility of an executor for his testator's debt. *Goring vs. Goring*, Yelv. 10, 11. *Contra* 1 Speare, 368, which cannot be law. The true doctrine is held in *Steinman vs. Magnus*, 2 Campb. 124; *S. C.* 11 East, 390; and the agreement is binding even before the smaller sum is accepted. *Bradley vs. Gregory*, 2 Campb. 388.

⁶ *Acker vs. Phoenix*, 4 Paige, 305.

ble when secured or fraud would be done to the surety, if the payment of the less sum was not a satisfaction; and whether it depends on an uncertain security or not, if it is not now due, present payment of a part may be more valuable than the future payment of the whole.¹ A debt payable in money will be discharged, if the creditor receives in full satisfaction from his debtor other species of property, as land,² a chattel,³ a chose in action, as the note of a third person,⁴ stocks and outstanding debts.⁵ The satisfaction must be proved to be equivalent, or to be received as equivalent. If so received it will discharge the debt, though far less valuable than the amount in money. It is in the nature of an exchange of property, and the law in this as in all contracts, will not fix prices for parties, or equalize the obligations they have voluntarily incurred.

§ 38.—It has been held that a composition between an insolvent debtor and his creditor, not under seal, is no defence to an action brought by any one creditor, unless, perhaps, all the debtor's property was assigned to trustees for distribution.⁶ But the better doctrine is, that such compositions are in general binding on all the parties, since, if any one creditor was allowed to sue for the residue, fraud would be done to the rest who were induced to join in it by his promise.⁷ A sealed acquittance of an entire debt on receiving

¹ *Steinman vs. Magnus*, 11 East. 390. See 6 Am. Law Mag. 18.

² *Howe vs. M'Kay*, 5 Pick. 44.

³ Litt. 344; *Pinnell's Case*, 5 Co. 117.

⁴ *Brooks vs. White*, 2 Met. 283; *Lee vs. Oppenheimer*, 32 Maine, 253; *Logan vs. Lee*, 5 Eng. (Ark.) 585. The *negotiable* promissory note of the debtor for a smaller sum than the amount due is now held a bar. *Sibree vs. Tripp*, 15 M. & W. 23. In general it would seem that the change of the security would make the payment of a smaller sum a satisfaction of a larger. *Silvers vs. Reynolds*, 2 Harrison, 275; *Stebbins vs. Smith*, 4 Pick. 97.

⁵ *Watkinson vs. Inglesby*, 5 Johns. 386. The rule of law stated in this section has been discountenanced in *Kellogg vs. Richards*, 14 Wend. 116; *Brooks vs. White*, 2 Met. 283; *Harper vs. Graham*, 20 Ohio, 105. But the reasons urged against it are equally applicable to the well settled doctrine of the common law, which renders a consideration necessary to the legal obligation of a promise.

⁶ *Heathcote vs. Crookshanks*, 2 T. R. 24; *Fitch vs. Sutton*, 5 East, 230.

⁷ *Boothby vs. Sowden*, 3 Camp. 174; *Wood vs. Roberts*, 2 Stark. 368; *Cockshott vs. Bennett*, 2 T. R. 763; *Butler vs. Rhodes*, 1 Esp. 236; *S. C. Peake*, 238; *Evans*

a part discharges the residue,¹ and where the debt is an unliquidated demand, or *bona fide* differences exist as to the amount due, an agreement to accept a sum certain is binding.²

§ 39.—*Charitable Subscriptions*.—The multitude and variety of such subscriptions to public institutions and private enterprises of benevolence render it important to inquire when are they supported by legal considerations. According to the analogies of the law, the subscriber should be bound to the extent his subscription has authorized others to make advances which they have actually made, or to incur liabilities which they have actually incurred in effecting its purpose before they have received from him notice of his dissent or withdrawal of his name. His signature clothed others with authority to pledge his credit, and he should be bound by their acts duly performed within the scope of that authority before its revocation. To this extent the binding force of such subscriptions is well settled.³ Thus, if several persons sign a paper pledging certain sums to the support of a newspaper and appoint a person to manage it, they are bound to him for his outlays under the stipu-

vs. Powis, 1 Exch. 601; *Good vs. Chessman*, 2 B. & Ad. 328; *Browne vs. Stackpole*, 9 N. H. 478; *Daniels vs. Hatch*, 1 Zabriskie, 391; *Fellows vs. Stevens*, 23 Wend. 294; *Warren vs. Skinner*, 20 Conn. 559; *Ray vs. Price*, 3 Tyrwh. 596. And a private agreement with one creditor unknown to the other creditors, to make his debt good, is a fraud on them, and not binding. *Cockshott vs. Bennett*, *supra*; *Lewis vs. Jones*, 4 B. & C. 511; *Trumbull vs. Tilton*, 1 Foster N. H. 128.

¹ Co. Litt. 212 (b); *Knight vs. Cox*, Bull. N. P. 153. Cancelling the instrument or security on payment of part by parole agreement executed, has been held equivalent to a release. *Silvers vs. Reynolds*, 2 Harrison, 275.

² *Wilkinson vs. Byers*, 1 A. & E. 106; *Adams vs. Japling*, 4 Mod. 88; *Sibree vs. Tripp*, 15 M. & W. 23; *Tuttle vs. Tuttle*, 12 Met. 554; *Donohue vs. Woodbury*, 6 Cush. 148.

³ *Bryant vs. Goodnow*, 5 Pick. 228; *Warren vs. Stearns*, 19 Id. 73; *Robertson vs. March*, 3 Scamm. 198; *Macon vs. Sheppard*, 2 Humph. 335; *Univ. of Vt. vs. Buel*, 2 Vt. 48; *Common School Fund, vs. Perry*, 5 Ohio, 58; *Sperry vs. Johnson*, 11 Id. 452; *Barnes vs. Perine*, 9 Barb. 202. If the subscription paper is under seal, it is held that the seal imports a consideration which cannot be denied. *Rutherford vs. The Executive Committee, &c.*, 9 Geo. 54. But even then the paper must be explicit, and contain a full contract. *First Universalist Society in Newburyport vs. Currier*, 3 Met. 417.

lated conditions to the amount subscribed.¹ Such subscriptions have also been held binding where the subscribers promise to share in certain expenditures to be made for the benefit of all. Thus, if several persons, members of a religious society, agree together to take the shares set against their respective names, in a meeting-house to be built for them, and to advance so much money on each share to a treasurer to be elected, each subscriber to be interested in the meeting-house proportionally to his subscription, the future interest or benefit to be derived from the contributions of the co-subscribers is a valid consideration.² Subject to these limitations, the rule which requires a consideration to support a contract would deny validity to voluntary subscriptions for the purpose of education, religion, charity, &c. So it has been decided in Maine,³ Massachusetts⁴ and very recently in New York,⁵ and to the same effect *dicta* may be found in the reports of Ohio⁶ and Vermont.⁷

§ 40.—There are decisions which in principle seem to sustain all voluntary subscriptions. Thus is New Hampshire, it has been held “that where several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of others.”⁸ In the early cases in Massachusetts, they were denied validity, when no liabilities had been incurred on faith of them,⁹ and in one case the subscribers were held, the proposed expenditures having been made without any withdrawal or

¹ *Holmes vs. Dana*, 12 Mass. 190.

² *Thompson vs. Paige*, 1 Met. 570; *Ives vs. Sterling*, 6 Id. 310.

³ *Foxcroft Academy vs. Havor*, 4 Greenl. 382.

⁴ *Boutell vs. Cowden*, 9 Mass. 254; *Phillips Academy, vs. Davis*, 11 Id. 114; *Bridgewater Academy vs. Gilbert*, 2 Pick. 579. As to the liabilities of members of the voluntary unincorporated societies for assessments, fines, &c., see *Warren vs. Stearns*, 19 Pick. 73; *Nash vs. Russell*, 5 Barb. 556.

⁵ *Stewart vs. The Trustees of Hamilton College*, 1 Comst. 581; *Barnes vs. Perine*, 9 Barb. 202; *Wilson vs. The Baptist Education Society*, 10 Id. 308.

⁶ 5 Ohio, 58.

⁷ *Univ. of Vt., vs. Buel*, 2 Vt. 48. But see 9 Id. 289.

⁸ *George vs. Harris*, 4 N. H. 533; *Cong. Soc. in Troy vs. Perry*, 6 Id. 504; *Curry vs. Rogers*, 1 Foster, 247.

⁹ See cases cited *supra*.

dissent.¹ The Supreme Court has since disregarded these precedents and attempted to sustain all voluntary subscriptions on the ground that "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant."² Still later, it has noticed this conflict of opinion without attempting to settle it or reconcile the cases³—and so the law of Massachusetts on this point is unsettled. In New York the authorities are in similar conflict;⁴ but recent cases discountenance the sweeping rule of the Supreme Court of New Hampshire, and hold that the endowment of a literary institution is not a sufficient consideration to sustain a subscription for that purpose.⁵ If the validity of such subscriptions shall yet be established, no liabilities having been incurred on account of them, it will be on the ground of a wise and just public policy, which dictates in this instance a departure in practice from the common law requirement of a consideration, and some fictitious consideration will be found to sustain it in theory.

§ 41.—*Mandates*.—It is well settled in the common law, that a promise to do something about another's property without reward is without consideration and void.⁶ And on general principles, if the trust was entered upon, it might be abandoned on partial performance, unless such abandonment was tantamount to fraud. This precise point has not been adjudicated, and there are *dicta* to the effect that the acceptance of the trust binds the mandatary to its

¹ Farmington Academy *vs.* Allen, 14 Mass. 172.

² Hanson *vs.* Stetson, 5 Pick. 506; Fisher *vs.* Ellis, 3 Id. 322; Amherst Academy *vs.* Cowles, 6 Id. 427.

³ Ives *vs.* Sterling, 6 Met. 310.

⁴ R. Soc. Whitestown *vs.* Stone, 7 Johns. 112; McAuley *vs.* Billenger, 20 Id. 89.

⁵ Stewart *vs.* The Trustees of Hamilton College, 1 Comst. 581; overruling the same case in 2 Denio, 403; Barnes *vs.* Perine, 9 Barb. 202; Wilson *vs.* The Baptist Education Society, 10 Id. 308. According to these authorities, such subscriptions are not binding where no liabilities have been incurred on faith of them, but there are *dicta* in them which indicate that if the trustees agree to procure or to endeavor to procure a certain sum for the institution or to invest or apply it in a certain way when procured; this, if distinctly stated in the agreement, would be a valid consideration. See Caul *vs.* Gibson, 3 Barr, 416; Collier *vs.* The Baptist Education Society, 8 B. Monr. 68; Blodgett *vs.* Munroe, 20 Vt. 509.

⁶ Story Bail. § 166.

completion. But if, having been accepted, it is negligently or unskillfully performed by the mandatary, the bailor may recover damages for his misfeasance.¹ This right to recover in such cases is put on the ground of a breach of contract.² If the promise to accept the trust is void for want of a consideration, it is not easy to discover how the acceptance supplies the defect. It has been said a consideration must be presumed without which the promise would not have been made³—a doctrine which would give binding force to every gratuitous promise. It is said also to be the damage which the bailee ultimately sustains⁴—a doctrine which would uphold every gratuitous undertaking where damage results to the promisee from the promisor's neglect to perform it. Most commonly, the the bailee's "being trusted with the property," or the bailor's "parting with the possession" is said to be the consideration.⁵ These cannot constitute a consideration, for they are exclusively for the benefit of the bailor to whom the promise is made. If the bailee is to receive any compensation in any shape whatever, and the bailment is not exclusively for the benefit of the bailor, it ceases to be a mandate.⁶ To this it is objected that the bailee is not at liberty to commit a tort and set up the contract in defence.⁷ The gratuitous bailee is certainly liable for torts committed on the subject of the trust. He has no more right to injure the property of another voluntarily intrusted to him than that not thus intrusted. In general, he is liable for that want of care and skill which he has authorized the bailor to expect from him. The law here, as in other cases, will redress an innocent party for the fraud or injury of another, whether a valid contract subsists between them or not.⁸ It is not difficult to ascertain why the bailor's right of action against

¹ *Coggs vs. Bernard*, 1 Ld. Ray. 909; *Elsee vs. Gatward*, 5 T. R. 143; *Thorne vs. Deas*, 4 Johns. 84. In Hen. IV. 33, it was held that no action would lie against a carpenter who promised to build a house without a consideration—but otherwise if he had begun the work and performed it unskillfully.

² *Chitty Cont.* 38.

³ *Cro. Eliz.* 883.

⁴ *Wheatley vs. Low, Palmer*, 281.

⁵ *Coggs vs. Bernard*, 2 Ld. Ray. 909; *Holt C. J. Brown vs. Hay*, 10 Iredell, 72, *Chitty Cont.* 38; *Story Bailm.* § 2, note.

⁶ *Story Bailm.* § 153.

⁷ *Story Bailm.* § 170.

⁸ 16 Am. Law Jur. 253. See a learned article by Mr. Wallace.

a gratuitous bailee, for his misfeasances has been put on the ground of contract, and that contract founded on a fictitious consideration. Legal rights may be classified according to their nature or their remedies. The promises of competent parties which include the elements of mutual benefit and mutual assent originate rights to which the denomination of contracts is given. The appropriate remedies which are used to enforce them are afterwards found applicable to rights of another nature, which are then included under the same denomination of contracts—the elements in which they are deficient being supplied by fictions. The action of *assumpsit*, founded on a promise which is averred, may be brought against the husband for necessities furnished to his wife for whom he has refused to provide without just cause, even in spite of his express prohibition. The same action may be brought against a gratuitous bailee for an injury done to the property intrusted to him. Such fictions are convenient, but it is always worth inquiry whether a classification has been determined by the law of right or by the law of remedy.¹

Cincinnati, O., April, 1854.

E. L. P.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States, December Term, 1853.

THE EXECUTORS OF JOHN M'DONOGH, DECEASED, ET AL., APP'TS, vs.
MARY MURDOCK, ET AL., HEIRS OF JOHN M'DONOGH, DECEASED.

1. A testator, residing in Louisiana, and leaving there a large succession by his will, after particular legacies, gave all the residue and remainder of his estate, real and personal, of whatever nature, (subject to certain annuities,) "to the corporations of the cities of New Orleans and Baltimore forever, one-half to each," for intents and purposes afterwards declared. He then directed his executors to convert all his personal estate into realty, whereby the whole of his estate should

¹ 21 Am. Jur. 260-6.